(4) Does the Court have jurisdiction to set aside the decision of the Comptroller of the Currency unless it was arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law?

ARGUMENT

I

THE PETITIONERS HAVE NOT STATED A CASE UPON WHICH CERTIORARI MAY BE GRANTED.

The considerations governing review on certiorari are stated in Rule 19 of this Court. Rule 23(1)(b) requires the petitioner to state concisely the grounds on which the jurisdiction of this Court is invoked.

On pages 7 and 8 petitioners state four so called "Reasons for granting the Writ." These may be summarized as three:

(1) the decision below *"appears to be"* in conflict with a decision of the Court of Appeals for the District of Columbia;

(2) the Courts below and the Comptroller have misconstrued the law of Kentucky; and

(3) have by their interpretation violated the intent of the National Banking Act by destroying the basic quality of the dual banking system.

The following discussion of their three so called reasons will, it is hoped, clearly indicate that this Court should deny the writ.

(1) There Is no Conflict Between the Sixth Circuit Court of Appeals Decision and the Decision of Any Other Circuit Court of Appeals.

The only case cited by petitioners to show a conflict is *Commercial State Bank* v. *Gidney,* 174 F. Supp. 770 (D. C. D. C. 1959), *aff'd per curiam,* 278 F. 2d 871 (D. C. Cir., 1960).

Even a casual reading of the two decisions clearly reveals there is no conflict. In the case at bar the District Court *did* review the Comptroller's conclusions of law (Conclusions 1-6, Petition Appendix 28, 29) and the District Court's conclusions were reviewed and affirmed by the Sixth Circuit.

In *First Hardin National Bank,* Kentucky law (KRS 287.180(1)(2)(b)) *permits* a state bank to establish a branch in any incorporated city in the same county if there is no principal bank, *as distinguished from a branch,* in that city. Radcliff is an incorporated city in Hardin County.

In *Commercial State Bank,* Michigan law (Michigan Financial Institutions Act, Sec. 437.34) *prohibits* the establishment of a branch in another city or village in the same county where the bank has its principal office *if there is either a bank or a branch* in that city or village (174 F. Supp. 770, 774). Michigan permits the establishment of branches *only* in cities or villages.

The District Court for the District of Columbia properly held that: (1) if the township of Clinton (unincorporated) is not a village then a branch could not be established; and (2) if Clinton is a village there

was already a bank branch there and hence another bank's branch may not be established (174 F. Supp. 770, 776). Accordingly the Court issued an injunction against the Comptroller.

(2) Neither Courts Below Nor the Comptroller Decided the Question in Conflict With Kentucky Law.

It is undisputed that Kentucky Law permits a state bank to establish a branch in another incorporated city in the same county if there is no principal bank *as distinguished from a branch* in that city (KRS 287.180-(2)(b)).

Not only this Court but the Court of Appeals of Kentucky have held that federal ownership of the land coupled with state cession of exclusive jurisdiction to the United States does not remove the area from the geographical boundaries of the county. *Howard* v. *Commissioners of Sinking Fund,* 344 U. S. 624, *aff'g* Ky., 249 S. W. 2d 816, 248 S. W. 2d 340.

It is clear that the Courts below and the Comptroller assiduously followed both Kentucky's statutory law and case law.

(3) The Courts Below and the Comptroller Clearly Interpreted the National Banking Act so as to Preserve the Basic Equality of State and National Banks in the Matter of Branching.

The National Banking Act (12 U. S. C. 36(c)) adopts the state's standards, in so far as *location* is concerned, as the Federal standards for the establishment of branches of national banks.

As we have shown above, had the Fort Knox Bank been a state bank, it could, with the permission of the Kentucky Commissioner of Banking, have established a branch in Radcliff, Hardin County, Kentucky (District Court's Conclusion 6, Petition Appendix 28).

II.

LAND LOCATED IN HARDIN COUNTY AT THE TIME OF ACQUISITION BY THE UNITED STATES AND CESSION OF JURISDICTION BY KENTUCKY REMAINS A PART OF HARDIN COUNTY AFTER ACQUISITION AND CESSION.

Petitioners readily admit that the principal office of the Fort Knox National Bank is located geographically in Hardin County (Petition, pp. 12, 13). But they then fall into the same error in interpreting *Commissioners of Sinking Fund of Louisville* v. *Howard,* 344 U. S. 624 (1953), as they did below. The first issue determined by this Court in *Howard* was:

> "(1) The validity of the annexation by the City of Louisville, of certain federally owned land on which a Naval Ordnance Plant is located;" (344 U. S. 624, 625).

If the Naval Ordnance Plant were not in Jefferson County contiguous to the City of Louisville, the City would have no *jurisdiction* to annex it. No Federal Statute intervened to authorize the *annexation.* The "Buck Act" (4 U. S. C. 105) intervened only to permit certain *taxation* in federal areas. *Annexation* was a condition precedent to *taxation* and was authorized not

by Federal statute but because, as stated by this Court (344 U. S. 626):

> "The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky."

Kentucky's jurisdiction over Fort Knox lies "dormant" so long as Congress retains exclusive jurisdiction as the Kentucky Court of Appeals said in deciding *Howard*, Ky., 248 S. W. 2d 340, 342 (1952):

> "A Federal area within the geographic boundaries of a state lies dormant, so far as concerns the authority of the state to exercise jurisdiction within the area, as long as Congress retains exclusive jurisdiction, but when Congress recedes part of its jurisdiction the area comes to life as a part of the state to the extent of the recession."

This concept of "dormant" jurisdiction was adopted by Sixth Circuit Court of Appeals in its opinion wherein it stated:

"Under the terms of the conveyance, the loss of jurisdiction was not absolute. The interest of Kentucky in the land conveyed became *dormant*, and will remain dormant so long as the land conveyed remains the property of the United States. When the United States ceases to own the land conveyed, jurisdiction will be *reactivated* in the State of Kentucky. The geographical structure of the State of Kentucky not only remains the same, but the state *retains a dormant jurisdiction* over the land . . ." (Emphasis supplied.) (361 F. 2d 276, 279).

Indeed, as pointed out in a footnote to the opinion of Circuit Judge Celebrezze (361 F. 2d 279), under sections 63 and 65 of the Constitution of Kentucky, no land may be stricken from Hardin County except by petition and vote of the majority of the people of Hardin County. This was never done.

III.

THE COURTS BELOW AND THE COMPTROLLER HAVE CORRECTLY CONSTRUED AND APPLIED THE LAW APPLICABLE TO THE ESTABLISHMENT OF BANK BRANCHES IN KENTUCKY.

When the Kentucky General Assembly first enacted the branch banking law in 1954 permitting limited county wide branch banking (KRS 287.180(2)), it must be presumed to have been aware of the decision of its highest Court (*Howard*, Ky., 248 S. W. 2d 340), that a *county is still a county* although the United States may own the land and have exclusive jurisdic-

tion over it. Therefore, it used the word "county" in KRS 287.180(2)(b)) in that context.

That section stripped of its nonessentials provides:

> "(2) Any Corporation . . . engaged in the business of banking . . . may apply to the Commissioner of Banking for permission to establish . . . within the county in which its principal office is located . . . in which there is no existing bank . . ."

It is admitted that Radcliff, Kentucky is an incorporated city in Hardin County in which there is no bank but only a branch of the First Hardin National Bank.

The pertinent provisions of KRS 287.180(2)(b) are:

> "(b) No such corporation shall be permitted to establish a branch in any incorporated city, other than the city in which its principal office is located . . . in which there is an existing bank . . . As used in this subsection, an 'existing bank' shall mean the principal office of a bank as distinguished from a branch thereof."

Thus it is clear that a state bank meeting the financial requirements of the Statute (which the Fort Knox National Bank undisputedly does) may, with the permission of the Commissioner of Banking, establish a branch in another incorporated city in the *same* county if there is no principal office of a bank in such city.

The pertinent provisions of the National Banking Act, 12 U. S. C. Sec. 36(c) are:

"(c) A national banking association may, with the approval of the Comptroller of the Currency establish and operate branches . . . *at any point within the state* in which said association is situated, if such establishment and operation are at the same time authorized to state banks by the statute law of the state in question . . . and subject to the restrictions as to location imposed by the law of the state on State banks." (Emphasis supplied.)

A similar contention to that made by petitioners that the part of the Fort Knox Reservation upon which the Fort Knox National Bank is located is not within Hardin County, was made in *Alabama-Tennessee Nat. Gas Co.* v. *City of Huntsville,* 257 Ala. 184, 191, 153 So. 2d 619, 626 (1963). City of Huntsville under a contract with the Gas Company had the exclusive right to sell gas in Madison County outside of the incorporated cities. Alabama had ceded all jurisdiction to the U. S. over some 44,000 acres comprising the Redstone Arsenal. The Gas Company contended that the Arsenal was no longer in Madison County within the meaning of the exclusive contract. The Alabama Supreme Court, relying on *Howard,* rejected the contention stating:

"The territory comprising Redstone Arsenal was described as being in Madison County when ceded to the Federal Government by the State of Alabama. That cession did not change either state or county boundaries. The territory over which the Federal Government acquired jurisdiction still remained in Madison County."

In *Bd. of Commissioners* v. *Board of School Com'rs*, 130 Ind. App. 506, 166 N. E. 2d 880, 881, 884 (1960), Marion County, Indiana, was held liable to the City of Indianapolis for school tuition of children whose fathers were "officially stationed and assigned to duty at a place within the geographical boundaries of Marion County but over which jurisdiction had been ceded to the United States." In relying on *Howard* the Court stated (166 N. E. 2d 884):

> "The legal concept of jurisdiction and the geographical structures of a state are not one and the same."

IV.

THE COURTS MAY NOT SET ASIDE THE DECISION OF THE COMPTROLLER UNLESS IT WAS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW.

The Federal Administrative Procedure Act, 5 U. S. Code, Section 1009(e)(b), clearly states the conditions upon which an action of an administrative agency can be set aside by the Federal courts. The one applicable to this case is as stated in the heading.

Having found that the action of the Comptroller of the Currency was not arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law, the lower Court and the Sixth Circuit had no alternative under the Administrative Procedure Act but to sustain the action of the Comptroller.

This exact question was passed upon by this Sixth Circuit Court of Appeals in *Community National Bank of Pontiac* v. *Saxon*, 310 F. 2d 224, wherein the Court stated:

> "It is well settled that the decisions of executive officers on questions of fact are conclusive if reasonably supported by substantial evidence" (310 F. 2d 226).

In a case decided in 1965, the United States Court of Appeals for the Third Circuit held in *N. L. R. B.* v. *Jas. H. Matthews & Co.*, 342 F. 2d 129, 131:

> "Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. This Court, and others, have heretofore held that 'something more than error is necessary to spell out arbitrary or capricious action.' . . . The fact that on the same evidence a reviewing court could have reached a decision contrary to that reached by the agency will not support a determination that the administrative action was arbitrary and capricious."

V.

ANSWERS TO PETITIONERS' POINTS OF ARGUMENT (Petition 8-22).

In their argument Petitioners attempt to establish three points as follows:

(1) Fort Knox is not within Hardin County within the meaning of Kentucky Revised Statute 287.180(2) and the Comptroller of the Cur-

rency has no authority 12 U. S. C. 36(c) to permit a national bank located on Fort Knox to establish a branch in Hardin County.

(2) Petitioners have not had their day in Court when the District Court and Court of Appeals have refused to fully review the Comptroller of the Currency's Finding of Law that the establishment of a bank in Hardin County by the Fort Knox National Bank is authorized by law.

(3) The determination of the Comptroller of the Currency and the Courts below is in conflict with the purposes and intent of the National Bank Act as found in 12 U. S. C., *et seq.*, as interpreted by the Courts.

We shall endeavor to answer each in order.

(1) Fort Knox Is Not Within Hardin County Within the Meaning of KRS 287.180(2).

This point has already been covered (*supra*, pp. 5, 6 and 7). However, we shall discuss the cases cited by Petitioners to which we have not already adverted.

On page 9 of the petition *State of South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842 (D. C. S. D., 1963), *aff'd* 335 F. 2d 444 (Cir. 8, 1964), *cert. denied,* 379 U. S. 970 (1964), was cited as support for the proposition that doubts concerning State law authorization of branches be resolved against permitting the branch. This is, indeed, a strange interpretation of that case. It involved *merger* of a state bank with a national bank, *not branching.* The Court

held that the State had no standing to maintain the action to prevent the merger, gave summary judgment for the defendant national bank, and dismissed the complaint.

On pages 10-13 three Kentucky cases are cited: *Hardin County Board of Supervisors* v. *Kentucky Limousines, Inc.*, Ky., 293 S. W. 2d 239 (1956); *Commonwealth* v. *King*, 252 Ky. 699, 68 S. W. 2d 45 (1934); and *Kingwood Oil Co.* v. *Henderson County Bd. of Sup.*, Ky., 367 S. W. 2d 129 (1963).

Kentucky Limousines is cited for the proposition that tangible property on the military reservation of Fort Knox is not subject to Kentucky ad valorem taxation. This we readily admit, but in that case the Kentucky Court recognized that Fort Knox was geographically in Hardin County (Petition, p. 12).

King involved the criminal jurisdiction of Kentucky of an offense committed on the reservation against a state bank branch (now no longer there). The Court properly held that Kentucky, having ceded exclusive jurisdiction, the State Courts had no jurisdiction.

Kingwood involved an attempt by Henderson County, Kentucky, to tax ad valorem Kingwood's oil and gas lease with the U. S. Department of Interior covering 700 acres of Camp Breckinridge, Kentucky. The Court held that, Kentucky, having ceded jurisdiction (KRS 3.110) and the Congress not having retroceded, Henderson County could not tax.

(2) Petitioners Have Not Had Their Day in Court.

For petitioners to claim "they have not had their day in Court" is patently absurd.

In *Mississippi Valley Barge L. Co.* v. *United States*, 292 U. S. 282, 287 (1934), this Court stated:

> "The *judicial function is exhausted* when there is found to be a rational basis for the conclusions approved by the administrative body." (Emphasis supplied.)

In *Mitchell Bros. Trucklines* v. *United States*, 225 F. Supp. 755, 758 (D. C. Ore., 1963), *aff'd* 378 U. S. 125, the above exact quotation was announced by the District Court and applied in that case.

In *Hoffman* v. *Ribicoff*, 305 F. 2d 1 (Cir. 8, 1962), where the Court reviewed a decision of the Secretary of Health, Education and Welfare under the Social Security Act, the Court said:

> "Where an administrative agency is charged with applying *general statutory language* to a concrete factual situation, the Courts will not disturb the conclusion reached by the agency if there is a rational basis in the record therefor." (Emphasis supplied.)

Both the District Court and the Sixth Circuit have carefully reviewed and approved the conclusions reached by the Comptroller. Petitioners have had their day in Court, and the judicial function has been exhausted.

In support of the contention that they have not had their day in Court petitioners cite other cases, none of which supports their contention (Petition 15-20).

Commercial State Bank v. *Gidney*, 174 F. Supp. 770 (D. C. D. C.), has been fully discussed (*supra*, p. 3). It does not support petitioners.

Patton v. *Railroad Retirement Board*, 313 F. 2d 434 (Cir. 5, 1963), involved a determination of which two persons claiming to be Patton's wife was the real one. The Court upheld the Board's finding that "Emma" and not "Stella" was the true widow. The Court pointed out that they should review the Board's legal conclusions. No one questions that. In the case at bar both the District Court and the Sixth Circuit reviewed the Comptroller's legal conclusions and agreed with them.

Boyd v. *Folson*, 257 F. 2d 778 (Cir. 3, 1958), is another widow's benefit case. The Social Security Administration had disallowed the benefits because, although decedent was contributing to his wife's support, he was not actually living with her. The Court reversed the conclusions of law and granted benefits.

Whitney National Bank v. *Bank of New Orleans and Trust Co.*, 323 F. 2d 290 (D. C. Cir., 1963), does involve branch banking. Louisiana law prohibits a state bank from establishing a branch in another parish. Whitney sought to expand its operations into an adjoining parish through the device of a bank holding company. The Court properly held that this was merely a device to circumvent Louisiana law and violated 12 U. S. S., Sec. 36.

Commercial Security Bank v. *Saxon,* 236 F. Supp. 457 (D. C. D. C., 1964), involved an interpretation by Utah's law which prohibited the establishment of a branch in cities other than the first class if there were already existing banks or branches "unless the bank seeking to establish such a branch shall take over an existing bank." The Comptroller granted approval for a national bank to establish a bank in Ogden, a second class city, where there already were four banks and two branches. The Court, holding that this violated Utah law, overruled the Comptroller. We haye no quarrel with that decision. If the Comptroller's interpretation of law differs from the Court's, the Court's must prevail.

But in the case at bar, both the District Court and the Circuit Court of Appeals reviewed the legal conclusions and agreed with them.

Conclusion (6) of the District Court (Petition 28) is as follows:

> "(6) A *state bank,* whose principal office is situated on that part of the Fort Knox Military Reservation which is a part of Hardin County, could, with the approval of the Kentucky Commissioner of Banking, establish a bank in the incorporated city of Radcliff, Hardin County, Kentucky." (Emphasis supplied.)

If a state bank can establish a branch in Radcliff under these circumstances, then the Fort Knox National Bank may do so.

On page 21 of the petition reference is made to an existing branch of the Fort Knox National Bank on

the Fort Knox Military Reservation in that part of that reservation which is in Meade County. This so called branch was established by the Fort Knox National Bank with the approval of the Comptroller of the Currency. This issue is not before this Court nor was it before the lower Courts. Appendix E of the petition contains the complaint which initiated this action. The complaint consists of 12 paragraphs. None of the paragraphs contains any reference to a branch in Meade County. Therefore, this issue is not before the Court and this Court should disregard any reference in the petition to a branch in Meade County. It is elementary that Courts may consider only issues raised by the pleadings. If petitioners or anyone desire to question the legality of the so called branch on the military reservation in Meade County, then that must necessarily be the subject of separate litigation. It was not considered by the District Court nor the Circuit Court of Appeals for the reason that it was not in issue.

CONCLUSION.

The Comptroller of the Currency's determination of Kentucky law was clearly reviewed by the District Court and the Circuit Court of Appeals. The Conclusion of Law of the District Court and the opinion of the Circuit Court of Appeals affirm the conclusions of the Comptroller of the Currency. As we have pointed out, a state bank with its principal office on the Fort Knox Military Reservation in Hardin County could establish, with the approval of the Comptroller, a

branch in Radcliff, Hardin County. Therefore, the Fort Knox National Bank is entitled to the same privilege under 12 U. S. Code, Section 36(c).

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectively submitted,

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CERTIFICATION.

I hereby certify that on this day, October 10, 1966, I have served the foregoing Fort Knox National Bank's Response to Petition upon the parties by mailing a copy of same to:

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